



Kurtis Shorter appeals his sentences for resisting law enforcement as a class D felony, operating while license suspended as a class A misdemeanor, and failure to stop after property damage accident as a class B misdemeanor. Shorter raises one issue, which we revise and restate as whether the trial court erred in sentencing him. We affirm.

The relevant facts follow. On June 9, 2010, Shorter, while accompanied by his fourteen-year-old nephew, was driving with a suspended license in Elkhart County, Indiana. At some point, Officer John Hammel attempted to pull Shorter over by activating his emergency lights. Shorter initially pulled over, but soon after Officer Hammel exited his vehicle Shorter “sped off southbound on 7<sup>th</sup> Street at a high rate of speed.” Sentencing Transcript at 10. Officer Hammel estimated that Shorter, while driving in a highly populated area, accelerated to about eighty miles per hour. At one point while attempting to flee, Shorter lost control of his car causing damage to a garage. After damaging the garage, Shorter did not make an effort to locate or notify the garage’s owner or provide his name, address, or registration number for his vehicle. Shorter was arrested soon after.

On June 10, 2010, the State charged Shorter with Count I, resisting law enforcement as a class D felony; Count II, operating while license suspended as a class A misdemeanor; and Count III, failure to stop after property damage accident as a class B misdemeanor. On June 18, 2010, a jury trial was set to commence, but at the outset of the hearing Shorter and the State orally introduced a plea agreement whereby if Shorter pled to the charges, then “the State of Indiana agrees to placement in Work Release at the

Elkhart Community Corrections Facility . . . .” Guilty Plea Transcript at 5. Also as part of the agreement, the State agreed that if Shorter pled that day to the charged offenses, it “would refrain from [at] any point in the future filing an obstruction of justice, witness tampering, and an habitual enhancement . . . .” Id. at 3. After listening to the proposed agreement, the court stated:

With respect to whether charges are filed I believe that’s a decision that’s solely the responsibility of the State and so I have no problem with that. Insofar as there’s any limitation on the placement that the Court can make at the time of sentencing I’m willing to consider the recommendation of the State but I would view it only as a recommendation given the fact that it’s tendered on the morning of trial. So there would not be a plea bargain in the sense that a guarantee that you would be placed in community corrections on work release, but I would certainly give consideration to that recommendation because it’s been agreed to by you and by the State of Indiana.

So if I saw something in your pre-sentence investigation that suggested to me that that is not appropriate then I would be able to sentence you as I saw fit under the circumstances. It’d be up to me to make that decision. Assuming there’s nothing in the pre-sentence investigation that would suggest that this is not appropriate then of course I would follow the recommendation.

Mr. Shorter do you understand the distinction or the difference between those two (2) positions?

Id. at 6-7. Shorter replied: “Yes.” Id. at 7. Soon after, the following colloquy occurred:

THE COURT: Understanding that do you still want to go ahead and enter a plea here? Understanding the reference to community corrections is simply a recommendation, but also given the fact that the State would be bound by its promise not to file any new charges arising out of this situation . . . ?

[Shorter]: Yes I understand Your Honor.

THE COURT: On that basis do you still want to go ahead and enter a plea?

[Shorter]: Yes.

Id. at 7-8. Shorter subsequently entered a plea of guilty.

On September 20, 2010, the court held a sentencing hearing. The State argued for three years executed on the charges, and it did not make a recommendation that Shorter serve his sentence on Work Release. The court listed Shorter's criminal history, his history of probation violations, that there was an outstanding warrant for his arrest at the time of the offense, that he fled at a high rate of speed in a residential area, and his acknowledged use of marijuana on a "somewhat regular basis" as aggravators and that he pled guilty as a mitigator of insignificant weight. The court sentenced Shorter to three years executed in the Department of Correction with six months suspended to probation on Count I, one year executed on Count II to be served concurrent with Count I, and 180 days on Count III to be served consecutive to Counts I and II with 180 days suspended to probation.<sup>1</sup> Thus, Shorter's aggregate sentence was two-and-a-half years executed in the Department of Correction followed by one year of probation.

The issue is whether the trial court erred in sentencing given the State's failure to recommend work release at the final hearing. Shorter argues that he "detrimentally relied on the State's illusory promise to recommend Work Release placement when he pled guilty to all charges filed against him." Appellant's Brief at 2. Shorter argues that "no doubt exists that [he] pled guilty based on the State's promises to refrain from filing new

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<sup>1</sup> The court also sentenced Shorter to two years executed in the Department of Correction to be served consecutive to the sentence on the instant offenses for a probation violation in another cause number.

charges against him and to agree to Shorter's placement in Work Release," and when the State subsequently failed to recommend work release at the sentencing hearing it breached its promise. Id. at 3. The State argues that it "was not required to recommend work release at sentencing where the court refused to accept the plea agreement." Appellee's Brief at 3. The State also argues that because Shorter did not object to the State's comments at the sentencing hearing he waived the argument. Id. at 5.

The Indiana Supreme Court has stated that contract principles can provide helpful guidance in examining issues involving plea agreements. Bowers v. State, 500 N.E.2d 203, 203-204 (Ind. 1986); see also Shepperson v. State, 800 N.E.2d 658, 659 (Ind. Ct. App. 2003) ("A plea agreement is contractual in nature."). However, the Court has also explained that "[o]ffer and acceptance of an agreement by the parties do not alone compel acceptance of the agreement by the trial court, else there would be no need for the trial court to accept or reject an agreement submitted to it under Ind. Code § 35-35-3-3," and that "a plea agreement [] constitute[s] a 'binding contract' only upon its acceptance by the trial court." Badger v. State, 637 N.E.2d 800, 803 (Ind. 1994) (footnote omitted). Indeed, "a defendant's acceptance of the prosecutor's proposed plea bargain does not create a constitutional right to have the bargain specifically enforced," and even after acceptance, until the agreement is embodied in the judgment of a court the State is "under no duty to keep the offer open." Coker v. State, 499 N.E.2d 1135, 1138 (Ind. 1986) (citing Mabry v. Johnson, 467 U.S. 504, 507-508, 104 S. Ct. 2543, 2546 (1984)), reh'g denied; see also Badger, 637 N.E.2d at 803 n.8.

Here, the court did not accept the plea agreement proposed by the parties. The court made clear to Shorter that it wanted to examine Shorter's pre-sentence investigation report before issuing its sentence, and that it would "be up to [the court] to make that decision." Guilty Plea Transcript at 6. If a court does not accept the contents of a plea agreement, "the court shall reject it . . . ." <sup>2</sup> Ind. Code § 35-35-3-3(b). Shorter does not direct us to, and our research does not reveal, authority for the proposition stating that parties are bound by the terms of a plea agreement after it has been rejected by the trial court and a defendant decides to plead guilty without the benefit of the agreement. Once the court rejected the proposed plea agreement here, it extinguished any agreement between Shorter and the State regarding how they would proceed on the matter going forward. The trial court, in its discretion and as it clearly indicated it would do, examined the pre-sentence investigation report, which recommended an executed sentence in the Department of Correction, and sentenced Shorter accordingly.

Furthermore, we note that even if Shorter had pled guilty pursuant to some sort of plea agreement, he failed to object to the State's recommendation at sentencing that he serve "three (3) years executed." Sentencing Transcript at 14. Consequently, Shorter has waived the argument. See Cox v. State, 696 N.E.2d 853, 860 (Ind. 1998) (noting that the defendant waived the ability to challenge statements made by prosecutor at sentencing to which he did not object), reh'g denied.

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<sup>2</sup> Regarding the other aspect of the proposed plea agreement that the State would not file additional charges, the court stated that "that's solely the responsibility of the State and so I have no problem with that." Guilty Plea Transcript at 6.

For the foregoing reasons, we affirm Shorter's aggregate sentence of two-and-a-half years executed in the Department of Correction followed by one year of probation.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.